

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PAUL CAUFIELD,

Plaintiff,

vs.

COLGATE-PALMOLIVE COMPANY  
EMPLOYEES' RETIREMENT INCOME  
PLAN,

Defendant.

Case No. 1:08-cv-03316-BSJ

Judge Barbara S. Jones  
Magistrate Judge Kevin N. Fox

**NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant Colgate-Palmolive Company Employees' Retirement Income Plan (the "Plan" or "Defendant"), by and through its counsel, respectfully gives notice to the Court of a recent decision by the United States Court of Appeals for the Second Circuit that bears on the timeliness of Plaintiff Paul Caufield's ("Plaintiff" or "Caufield") claims.

In Hirt v. Equitable Ret. Plan for Employees, Managers and Agents, Nos. 06-4757-cv (L), 06-5190-cv (XAP), 2008 WL 2675828, at \*2 (2d Cir. July 9, 2008) (attached hereto as Exhibit 1), the Second Circuit held that the plaintiffs' ERISA claims were time-barred. Most directly relevant to this case, the Court held that the distribution of the summary plan document ("SPD") that disclosed the benefits that would be paid constituted a "clear repudiation" of any claim for benefits that plaintiffs could raise, such that the plaintiffs' claims accrued when the SPD was distributed. Id. at \*2. In reaching its conclusion, the Second Circuit emphasized the "central role that the SPD plays in communicating the terms of a plan to its members." Id. at \*2 (citation and internal quotations omitted). The Court noted:

**To the extent that a plan participant had received insufficient notice of a plan amendment or otherwise considered himself entitled to benefits other than those disclosed in the SPD, the SPD "unequivocally repudiated" that understanding.** Accordingly, any claim that participants received insufficient

notice of the 1988-1992 amendments accrued upon the distribution of the 1992 SPD in December 1992, and plaintiffs' 2001 claims were therefore untimely.

Id. at \*2 (citations omitted) (emphasis added).

The same is true here. Plaintiff received his lump sum benefit in 1999. (Compl., ¶ 9). The Summary Plan Description for the Plan in effect in 1999 informed Caufield that if he elected a lump sum benefit, he would receive a lump sum equal to his account balance, and nothing more. (See 1994 Summary Plan Description, attached hereto as Exhibit 2, p. 9.12) (“**Lump-Sum Option** -- An option available to both married and unmarried employees is a lump-sum payment of the total value of your PRA [Personal Retirement Account] balance.”) (emphasis in original).<sup>1</sup>

As in Hirt, “the SPD ‘unequivocally repudiated’” any claim or entitlement to benefits beyond the account balance. 2008 WL 2675828, at \*2 (citation and internal quotations omitted). Accordingly, Defendant’s Motion to Dismiss Plaintiff’s Complaint, filed on April 16, 2007, should be granted.

Respectfully submitted,

Dated: August 4, 2008

MORGAN, LEWIS & BOCKIUS LLP

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<sup>1</sup> The relevant page of the 1994 SPD is an exhibit to the Reply Memorandum In Further Support Of Defendant’s Motion to Dismiss, filed on June 5, 2007. This page is attached hereto as Exhibit 2 for the convenience of the Court.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2008, a copy of the foregoing Defendant's Notice of Supplemental Authority In Support Of Defendant's Motion to Dismiss Plaintiff's Complaint, and papers in support thereof, was mailed, by first class U.S. mail, postage prepaid, and properly addressed to the following:

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# **EXHIBIT 1**



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**H**irt v. Equitable Retirement Plan for Employees,  
Managers and Agents  
C.A.2 (N.Y.),2008.

Only the Westlaw citation is currently available. This  
case was not selected for publication in the Federal  
Reporter.

United States Court of Appeals, Second Circuit.  
Stefanie HIRT, Barbara Seay, Ann Nussbaum, Susan  
Chwast, and Loretta Ronzca, Plaintiffs-Appellants-  
Cross-Appellees,  
v.

The EQUITABLE RETIREMENT PLAN FOR  
EMPLOYEES, MANAGERS AND AGENTS and  
The Officers Committee On Benefit Plans, as Plan  
Administrator, Defendants-Appellees-Cross-  
Appellants.

Nos. 06-4757-cv (L), 06-5190-cv (XAP).

July 9, 2008.

Appeal from the United States District Court for the  
Southern District of New York ([Hellerstein](#), J.).

[Edgar Pauk](#), New York, NY, for Plaintiffs-  
Appellants.

[Kenneth S. Geller](#) ([Craig W. Canetti](#), on the brief),  
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Benefits Council, AT & T Corp., Business  
Roundtable, BP America Inc., El Paso Corporation,  
Honeywell International Inc., Mercer Human  
Resource Consulting, Inc., Watson Wyatt  
Worldwide, and Xerox Corporation.

[Carol Connor Flowe](#) and [Gretchen Dixon](#), Arent Fox  
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[Shane Brennan](#), National Chamber Litigation Center,  
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Commerce of the United States of America.

[Jeffrey Lewis](#) and [Vincent Cheng](#), Lewis, Feinberg,  
Lee, Renaker & Jackson, P.C., Oakland, CA, [Stephen](#)  
[R. Bruce](#) and Allison C. Caalim, Stephen R. Bruce  
Law Offices, Washington, DC, [Lynn Lincoln Sarko](#),  
[Derek Loeser](#), [Amy Williams-Derry](#), and [Karin](#)

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[Marissa M. Tirona](#), National Employment Lawyers  
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[Eli Gottesdiener](#), Gottesdiener Law Firm, PLLC,  
Brooklyn, N.Y. for Amicus Curiae Pension Rights  
Center.

[Jeffrey P. Englander](#), Morrison Cohen LLP, New  
York, N.Y. for Amicus Curiae Young Women's  
Christian Association Retirement Fund, Inc.

Present [DENNIS JACOBS](#), Chief Judge, [AMALYA](#)  
[L. KEARSE](#), and [ROBERT A. KATZMANN](#),  
Circuit Judges.

## SUMMARY ORDER

**\*1 ON CONSIDERATION WHEREOF**, it is  
hereby **ORDERED, ADJUDGED, and DECREED**  
that the judgment of the district court entered on  
October 10, 2006, be and hereby is **AFFIRMED**.

Plaintiffs, all long-term employees, managers, and  
agents of The Equitable Life Assurance Society of  
America ("Equitable"), filed suit in the Southern  
District of New York challenging various aspects of  
Equitable's defined benefit pension plans under the  
Employee Retirement Income Security Act of 1974  
(ERISA), [29 U.S.C. § 1001 et seq.](#) We write a  
separate opinion today addressing plaintiffs' claim  
that, in providing benefits under a "cash balance"  
system, defendants violated ERISA's rule against  
age-based reductions in the rate of benefit accrual, as  
that rule applied prior to the amendment that took  
effect as of June 29, 2005. *See* ERISA § 204(b)(1)(h),  
[29 U.S.C. § 1054\(b\)\(1\)\(H\)](#). We address here  
plaintiffs' claims that defendants failed to sufficiently  
notify them of amendments to the defined benefit  
plans, as required by ERISA § 204(h), [29 U.S.C. §](#)  
[1054\(h\)](#). We assume familiarity with the facts and  
procedural history on appeal.

Very generally, through a series of three amendments  
from 1988 until 1992, Equitable modified the pension  
plans it offered to employees, managers, and agents,  
converting them from traditional defined benefit  
plans, which based benefits on a function of final

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salary and years of service, to a single cash balance plan, measuring benefits by accruing credit annually in a hypothetical account and converting the fictional "balance" into an annuity or the actuarial equivalent thereof. Plaintiffs filed suit on August 23, 2001, claiming, *inter alia*, that the amendments did not satisfy the requirements of ERISA § 204(h) as it was then in effect, which stated that a defined benefit plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to ... each participant in the plan." 29 U.S.C. § 1054(h)(1)(A) (1997). Addressing cross-motions for summary judgment, the district court determined that Equitable provided sufficient notice under ERISA § 204(h) as a matter of law for all but one of the amendments at issue, and that Equitable provided insufficient notice as a matter of law for the amendment that was implemented on January 1, 1991. In a subsequent ruling, the district court found all of plaintiffs' notice-based claims time-barred under the six-year limitations period applicable to claims under ERISA § 204(h) in New York,<sup>FN1</sup> which the district court found had been triggered by the distribution of the 1992 summary plan document ("SPD").

<sup>FN1</sup>. The parties do not dispute the application of the six-year statute of limitations period. See Miles v. New York State Teamsters Conference Pension and Ret. Fund Employee Pension Ben. Plan, 698 F.2d 593, 598 (2d Cir.1983) (applying a six-year statute of limitations to ERISA civil enforcement actions under 29 U.S.C. § 1132).

We review the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to plaintiffs and drawing all reasonable inferences in their favor. See, e.g., Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan, 201 F.3d 44, 47 (2d Cir.1999). As the district court correctly explained, "[a] plaintiff's ERISA cause of action accrues, and the six-year limitations period begins to run, when there has been a repudiation by the fiduciary which is *clear* and made known to the beneficiaries." Miles v. New York State

Teamsters Conference Pension and Ret. Fund Employee Pension Ben. Plan, 698 F.2d 593, 598 (2d Cir.1983) (internal quotation marks omitted) (emphasis in original). Although the limitations period generally begins to run when a participant's application for benefits is denied, we have held that "a cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff-regardless of whether the plaintiff has filed a formal application for benefits." Carey, 201 F.3d at 47-48.

\*2 We agree with the district court that the distribution of the 1992 SPD constituted a clear repudiation of any pre-amendment benefits that plaintiffs could possibly claim. We have emphasized "the central role that the SPD plays in communicating the terms of a plan to its members." Frommert v. Konkright, 433 F.3d 254, 265 (2d Cir.2006). In this case, the SPD plainly and accurately described the pension plan as it then applied to employees, managers, and agents with various terms of service. It distinguished between pre-1989 and post-1989 benefits for employees and managers and between pre-1993 and post-1993 benefits for agents. To the extent that a plan participant had received insufficient notice of a plan amendment or otherwise considered himself entitled to benefits other than those disclosed in the SPD, the SPD "unequivocally repudiated" that understanding, Carey, 201 F.3d at 49. Accordingly, any claim that participants received insufficient notice of the 1988-1992 amendments accrued upon the distribution of the 1992 SPD in December 1992, and plaintiffs' 2001 claims were therefore untimely.

Having determined that the ERISA § 204(h) claims were time-barred, we need not reach the district court's disposition of the claims on the merits, and we dismiss the cross-appeal as moot.

For the foregoing reasons, the judgment of the district court finding plaintiffs' notice-based claims barred by the statute of limitations is hereby **AFFIRMED**.

C.A.2 (N.Y.), 2008.

Hirt v. Equitable Retirement Plan for Employees, Managers and Agents

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END OF DOCUMENT

# **EXHIBIT 2**

Monthly pension payments are determined by the value of your account balance, interest rates and life expectancy assumptions.

### Payment Options

You can elect an optional payment method instead of the automatic form by notifying your local Human Resources representative prior to your retirement date. If you are married and elect an option that does not provide continuing pension payments to your spouse after your death, the law requires that your spouse provide written consent that is notarized or witnessed by a Plan representative. Written consent must be provided to your local Human Resources representative no earlier than 90 days before payment from the Plan and no later than the benefit commencement date.

**Lump-sum Option** — An option available to both married and unmarried employees is a lump-sum payment of the total value of your PRA balance. Keep in mind, if you are married, your spouse must consent in writing to this form of payment.

**Joint Annuitant Option** — Both married and unmarried employees can have their benefits paid according to a joint annuitant option. This option is similar to the qualified joint and survivor annuity for married employees, except that you can choose the percentage (for example, 25%) of your benefit you want to continue to your spouse or other beneficiary after your death. It is important to note that, if you are married and want to name someone other than your spouse as joint annuitant, you must have your spouse's written consent.

Remember, this written consent must be notarized or witnessed by a Plan representative.

The following rules apply to electing the joint annuitant option:

- If you or your beneficiary die before you retire, the option is canceled.
- If this option would provide a monthly benefit of less than \$50, the Company must consent to your election.
- You must be scheduled to receive at least 50% of your earned benefit if you select this option.
- Your beneficiary cannot receive more than 100% of your normal retirement benefit.

If you select this option, you must furnish proof of your joint annuitant's age. The amount by which your pension is reduced is determined by the percentage of your benefit you continue to your joint annuitant, and the difference in age between you and your joint annuitant.

**Life Annuity Option** — An option available to both married and unmarried employees is a life annuity option. Under this benefit you will receive monthly pension payments for life. After your death, all payments stop. Again, if you are married, your spouse must consent in writing to this form of payment.

In addition, other payment options are available under this Plan. For more information about these options, contact your local Human Resources representative.

### Changing Your Election

In general, you have the right to change the method of payment you elect up until the time your benefit begins, although you may be

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